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REDACTED – FOR PUBLIC INSPECTION

March 5, 2007

**VIA HAND DELIVERY**

FILED/ACCEPTED
MAR - 5 2007
Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Suite TW-A325
Washington, D.C. 20054

*RE: Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172*

Dear Ms. Dortch:

Enclosed please find a redacted, public version of Time Warner Cable's comments in the above-captioned matter. Pursuant to the Protective Order issued on September 14, 2006, a confidential version of Time Warner Cable's comments is being filed under separate cover.

Please direct any inquiries regarding this submission to the undersigned.

Sincerely,

Brian W. Murray
*Counsel to Time Warner Cable*

Enclosure

cc (via electronic mail): Janice M. Myles

No. of Copies rec'd 0+4
List A B C D E

**Before the**
**Federal Communications Commission**
***Washington, D.C. 20554***

FILED/ACCEPTED

MAR - 5 2007

Federal Communications Commission
Office of the Secretary

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| In the Matter of | ) | |
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| Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas | ) | WC Docket No. 06-172 |

# COMMENTS OF TIME WARNER CABLE


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March 5, 2007

**REDACTED – FOR PUBLIC INSPECTION**

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## COMMENTS OF TIME WARNER CABLE

Time Warner Cable submits these comments in response to Verizon's petitions in the above-captioned docket.[1] Verizon appears to seek forbearance from all dominant carrier and unbundling obligations, for mass market and enterprise services alike, throughout all parts of six metropolitan statistical areas ("MSAs"). Such sweeping relief would far exceed the scope of forbearance authorized in the *Omaha Forbearance Order*,[2] even though facilities-based competitors appear to have captured far less market share in Verizon's service areas than in the

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[1] *See Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the New York Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006) ("*Verizon NY Petition*"); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Pittsburgh Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Providence Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006).

[2] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *petition for review pending*, *Qwest Corp. v. FCC*, No. 05-1450 (D.C. Cir. filed Dec. 12, 2005).

Omaha MSA.[3] The Commission at a minimum should adhere to the limitations established in the *Omaha Forbearance Order*, ensuring that: (1) all interconnection obligations and related requirements continue in full force, (2) Verizon remains subject to dominant carrier regulation in the market for enterprise services, and (3) any unbundling relief is restricted to wire centers that satisfy the applicable competitive build-out threshold.

## INTRODUCTION AND SUMMARY

Time Warner Cable has consistently advocated a level playing field for all competitors in the communications marketplace, with the important caveat that service providers with market power should be subject to competitive safeguards. Consistent with that principle—and provided that interconnection and other essential building blocks of competition remain in place—Time Warner Cable believes that forbearance from legacy regulations is appropriate in product and geographic markets that have become sufficiently competitive.

Verizon seeks relief that is overbroad, however: Even assuming that its mass market voice services should be deregulated based on the emergence of facilities-based competition from cable operators, its special access and other business services require continuing regulatory oversight because of the absence of effective MSA-wide competition. Time Warner Cable and other cable operators have only recently introduced business-class services in most areas, and they have yet to make a significant dent in Verizon's dominance of last-mile connectivity or

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[3] The Commission recently reaffirmed the analytical framework it employed in the *Omaha Forbearance Order* when it granted certain forbearance relief in the Anchorage MSA that closely followed the relief granted in the Omaha MSA. *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)91) in the Anchorage Study Area*, Memorandum Opinion and Order, WC Docket No. 05-281, at ¶ 2 (rel. Jan. 30, 2007) ("*Anchorage Forbearance Order*"), *petition for review pending, General Communications Inc. v. FCC*, No. 07-70526 (9th Cir. filed Feb. 9, 2007).

transport services. Nor does existing cable plant have sufficient geographic coverage and building access to pose a near-term threat to such dominance.

By the same token, Verizon seeks unbundling relief throughout every corner of the six MSAs at issue, relying on the faulty premise that the presence of facilities-based competition in some wire centers somehow justifies forbearance from unbundling obligations in other wire centers. Assuming *arguendo* the validity of the *Omaha Forbearance Order*,[4] forbearance from unbundling obligations can be justified in a particular wire center only to the limited extent that a facilities-based competitor passes the requisite threshold of customer premises[5]—a restriction that Verizon simply ignores in its petitions.

More broadly, the Commission should ensure that it forbears from applying legacy regulations in an evenhanded manner across different industry sectors. At the same time that Verizon and other incumbent LECs contend that they are subject to excessive regulation in the voice marketplace, they are seeking asymmetrical regulation in the video marketplace.[6] That

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[4] Time Warner Cable believes that the unbundling relief granted in the Omaha MSA should have been limited to voice-grade loops, because the Commission overstated the extent to which a cable competitor is equipped to serve enterprise customers in most areas.

[5] In its recent *Anchorage Forbearance Order*, the Commission employed the same threshold it had adopted in the *Omaha Forbearance Order*. *See Anchorage Forbearance Order* at ¶ 9 ("[W]e apply the same analytic framework to our analysis of the level of competition in the Anchorage study area in this proceeding that the Commission applied to its analysis of competition in the Omaha MSA."); *id.* at ¶ 32. However, the publicly available versions of the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* redact the build-out percentage used to determine the wire centers in which Qwest and ACS, respectively, were entitled to forbearance from unbundling obligations. For purposes of these comments, Time Warner Cable assumes that the percentage is substantial and that the Commission would require an equivalent degree of facilities deployment before granting forbearance to Verizon in any wire center.

[6] *See generally Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, at ¶ 2 (rel. Mar. 5, 2007) (adopting deregulatory rules to address the Commission's "concern[] . . . that

inconsistency is particularly ironic in light of the fact that cable operators for years have been subject to effective competition in all markets from at least two nationwide DBS providers, while voice competition is nascent and remains quite limited in most markets.

Time Warner Cable does not seek to impose regulation on its competitors except to the extent necessary to curb market power; indeed, Time Warner Cable agrees that incumbent LECs should be afforded regulatory relief in those markets that are subject to effective competition. Incumbent LECs likewise should refrain from seeking to create regulatory disparities in the provision of video services, and the Commission should relieve cable operators of unnecessary regulatory burdens in the competitive video marketplace to no less an extent that it eliminates legacy voice regulations. Thus, while Verizon may be entitled to limited forbearance, as described below, the same type of market power analysis that warrants regulatory relief here should lead the Commission to treat cable operators no less favorably than incumbent LECs under Title VI.

## BACKGROUND

Time Warner Cable, the nation's second largest cable operator, owns or manages cable systems passing more than 26 million homes and serving more than 14 million subscribers. In addition to its basic and digital cable services, Time Warner Cable offers broadband Internet access and a facilities-based VoIP service, Digital Phone.[7] As of December 31, 2006, Time Warner Cable served approximately 1.9 million Digital Phone subscribers, and that total is

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traditional phone companies seeking to enter the video market face unreasonable regulatory obstacles"); *see also, e.g.*, Comments of Verizon on Video Franchising, filed in MB Docket No. 05-311 (Feb. 13, 2006) (arguing that the franchising regime of Section 621 of the Act should not apply to telephone companies providing video service); Comments of AT&T Inc., filed in MB Docket No. 05-311 (Feb. 13, 2006) (same).

[7] Time Warner Cable also provides circuit-switched telephone services to customers previously served by Comcast but has announced its intention to discontinue such services.

growing rapidly. Although Digital Phone has been a remarkable success, Time Warner Cable's overall voice service penetration to serviceable homes was less than 10 percent as of December 31, 2006, and its participation in the enterprise market remains nascent.

Of the six MSAs for which Verizon seeks forbearance, Time Warner Cable provides service only in the New York MSA. These comments accordingly focus on the state of competition and purported justifications for forbearance in the New York MSA, although the principles at issue—including the need to deny forbearance to the extent that Verizon has not made the requisite showing under the *Omaha Forbearance Order*—apply equally to each Verizon petition.

## DISCUSSION

### I. THE *OMAHA FORBEARANCE ORDER* ESTABLISHES THE APPROPRIATE FRAMEWORK FOR EVALUATING VERIZON'S PETITIONS.

The Commission's application of the Section 10 forbearance standard in the *Omaha Forbearance Order*, as reaffirmed in the *Anchorage Forbearance Order*, establishes important limitations on the relief available to Verizon.[8] As the Commission recognized in evaluating Qwest's request for forbearance from interconnection, unbundling, and dominant carrier regulations, a carrier seeking forbearance from regulation under Section 10 of the Act must demonstrate that:

> (1) enforcement of the regulation is not necessary to ensure that the charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory;
> (2) enforcement of the regulation is not necessary to protect consumers; and
> (3) forbearance is consistent with the public interest.[9]

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[8] Time Warner Cable does not concede the validity of the *Omaha Forbearance Order*, but assumes for purposes of this proceeding that the Commission properly applied the statutory standard.

[9] *Omaha Forbearance Order* at ¶ 13; *see also* 47 U.S.C. § 160(a); *Anchorage Forbearance Order* at ¶ 10.

In making such determinations, the Commission considers "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[10]

Applying these standards in the *Omaha Forbearance Order*, the Commission unequivocally held that forbearance from the interconnection provisions and related requirements in Section 251(c) and Section 271 could not be justified. The Commission held that, even where a cable operator has extensive facilities-based coverage, it necessarily "depends on [the incumbent LEC] for interconnection, collocation, and reasonable notice of changes in [its] network in order to exchange telecommunications traffic."[11] Indeed, "[f]orbearing from section 251(c)(2) interconnection and related section 251(c) requirements such as collocation likely would give [the incumbent LEC] . . . the ability to exercise market power over interconnection."[12] Thus, the very competition that warranted the limited forbearance granted in Omaha would be undercut if competitors lost their rights to interconnect at any technically feasible point and to exchange traffic on regulated terms and conditions. For similar reasons, the Commission rejected Qwest's bid to be released from its statutory duty to negotiate in good faith the terms and conditions of interconnection agreements, as well as the resale obligations of

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[10] 47 U.S.C. § 160(b). In addition, pursuant to Section 10(d), "the Commission may not forbear from applying the requirements of Section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." *Id.* § 160(d). In the *Omaha Forbearance Order*, the Commission found that both statutory provisions have been "fully implemented." *Omaha Forbearance Order* at ¶¶ 52-56.

[11] *Id.* at ¶ 85.

[12] *Id.* at ¶ 86.

Section 251(c)(4).[13] The Commission also generally refused to forbear from the interconnection, unbundling, and resale obligations in Section 271(c)(2)(B).[14]

Based on the preservation of these interconnection and wholesale-access requirements, and in light of Cox's remarkable success in the residential telephony market, the Commission determined that a limited degree of forbearance was appropriate in the *Omaha Forbearance Order*. But the Commission appropriately applied the forbearance standard on a granular basis, reaching different conclusions with respect to the discrete geographic and product markets at issue.

Specifically, while Qwest sought forbearance from the application of dominant carrier regulations to mass market and enterprise services, the Commission found that Qwest's failure to demonstrate sufficient competition for enterprise services throughout "the entire MSA" compelled denial of that "aspect of the Petition."[15] The Commission granted forbearance from dominant carrier regulation of Qwest's mass market switched access services, but it did so based in large part on Qwest's substantial loss of residential access lines.[16] Moreover, as described further below, the Commission conditioned its grant of forbearance from regulation of Qwest's

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[13] *Id.* at ¶¶ 87-89.

[14] *Id.* at ¶¶ 93-110. The Commission granted forbearance from Section 271 only to the limited extent that it authorized unbundling relief in selected wire centers under Section 251(c). Thus, Qwest is no longer required to provide unbundled access to loops and transport at TELRIC rates pursuant to Section 271 in any wire center for which the Section 251(c)(3) unbundling obligations were lifted. But Qwest must continue to provide access to UNEs at TELRIC rates in other wire centers, and in all areas it must provide interconnection, resale, and wholesale access to loops, transport, and switching at just and reasonable prices. *See id.* at ¶¶ 100-10. Qwest also must continue to provide access to poles, ducts, conduits, and rights of way pursuant to Section 271(c)(2)(B)(iii) (and Sections 224 and 251(b)(4)). *See id.* at ¶¶ 97-98.

[15] *Id.* at ¶ 50.

[16] *Id.* at ¶ 39.

mass market switched access services on Qwest's compliance with the same "benchmark" regime that applies to competitive carriers.[17]

Similarly, while Qwest sought forbearance from loop and transport unbundling obligations throughout the entire Omaha MSA, the Commission determined that Qwest was entitled to relief only in those wire centers where a facilities-based competitor's network covered a threshold percentage of accessible end-user locations.[18] Indeed, the Commission specifically considered and rejected using an entire MSA as the basis for assessing the level of facilities-based competition.[19] The Commission made clear that, where the build-out threshold is not satisfied in a particular wire center, continued enforcement of existing unbundling requirements remains necessary to protect competition and consumers.[20]

The Commission undertook the same "wire center approach" in ruling on ACS's request for forbearance from unbundling requirements consistent with the *Omaha Forbearance Order*.[21] In doing so, it again rejected the argument that it consider "the entire Anchorage study area as the relevant geographic market."[22] As the Commission explained, in order "[t]o ensure that the

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[17] *Id.* at ¶ 41. Specifically, Qwest's switched access charges may be tariffed, and thus presumed reasonable, only if they do not exceed a specified benchmark—in this case, Qwest's tariffed rate as of July 1, 2005. *Id.* Because rates that exceed the benchmark are mandatorily detariffed, such rates cannot be imposed unilaterally and are not entitled to a presumption of reasonableness.

[18] *Id.* at ¶ 62.

[19] *Id.* at ¶ 69 n.186 ("Using such a broad geographic region would not allow us to determine precisely where facilities-based competition exists. . . .").

[20] *See id.* at ¶¶ 61-62.

[21] *Anchorage Forbearance Order* at ¶ 16; *see also id.* at ¶ 9 ("apply[ing] the same analytical framework" as that employed in the *Omaha Forbearance Order*); *id.* at ¶ 12 (noting that ACS sought "UNE forbearance relief similar to the UNE relief the Commission granted" in the *Omaha Forbearance Order*). ACS's petition sought forbearance only with respect to its unbundling obligations under Section 251(c)(3) and the related pricing standard set forth in Section 252(d)(1). *Id.* at ¶ 1.

[22] *Id.* at ¶ 15.

forbearance we grant ACS tracks competitive realities in the Anchorage study area," the Commission would "tailor ACS's relief to those locations" where the record demonstrated the existence of "sufficient facilities-based competition."[23] Thus, the Commission denied ACS forbearance relief in connection with its unbundling obligations in those wire centers where "ACS has not demonstrated that it is not subject to significant competition that is not largely premised on ACS's wholesale services."[24]

As discussed below, although Verizon purports to seek "substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*,"[25] it at times appears to be seeking sweeping MSA-wide relief without regard for the limitations set forth in that order. In particular, Verizon fails to acknowledge the Commission's refusal in the *Omaha Forbearance Order* to forbear from (1) interconnection-related requirements, (2) dominant carrier regulation of enterprise services, and (3) unbundling obligations in wire centers with insufficient facilities-based competitive build-out. In light of Verizon's concession that its petitions should be adjudicated pursuant to the standards adopted in the *Omaha Forbearance Order*,[26] any grant of forbearance at a minimum should be subject to these basic restrictions.

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[23] *Id.* at ¶ 21.

[24] *Id.* at ¶ 23. The Commission's analysis was even more granular. It granted ACS's request for forbearance from its obligation to provide access to subloops under Section 51.319(b)(1) of the Commission's rules but denied such relief in connection with ACS's obligation to provide subloops used to access multiunit premises wiring under Section 51.319(b)(2), finding "unrebutted evidence" that the forbearance criteria were not satisfied with respect to this latter obligation. *Id.* at ¶ 24.

[25] *Verizon NY Petition* at 1.

[26] *See id.*

## II. THE COMMISSION SHOULD ENSURE THAT VERIZON REMAINS FULLY SUBJECT TO ALL INTERCONNECTION-RELATED REQUIREMENTS AND OTHER COMPETITIVE SAFEGUARDS.

In ruling on Verizon's petitions, the Commission should expressly reaffirm that forbearance from any interconnection-related requirements cannot be justified. A failure to do so could lead to needless disputes about interconnection rights and in turn erode the foundation of facilities-based competition. The Commission also should subject Verizon to the same conditions it imposed on Qwest to the extent it grants forbearance with respect to Verizon's switched access services.

First, the Commission should confirm that, notwithstanding any forbearance relief it grants in this proceeding, Verizon remains subject to the interconnection-related obligations under Section 251(c) as to which the Commission denied relief in the *Omaha Forbearance Order*.[27] There can be no legitimate contention that such obligations are no longer necessary to protect competition and consumers. Verizon's nearly ubiquitous coverage resulting from its decades of monopoly status makes the interconnection duties and related mandates in Section 251(c) essential prerequisites to competition. Indeed, as the Commission recognized in rejecting Qwest's request for forbearance from such duties—despite the presence of far greater retail competition in Omaha than appears to exist in any of the six MSAs at issue here—facilities-based competitors necessarily rely on access to the incumbent LEC's network in order to exchange telecommunications traffic.[28] While cable operators have now deployed telephony

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[27] Specifically, the Commission denied Qwest's request to forbear from applying 47 U.S.C. §§ 251(c)(1) (duty to negotiate in good faith), 251(c)(2) (interconnection at any technically feasible point), 251(c)(4) (discounted resale), 251(c)(5) (notice of network changes), and 251(c)(6) (collocation), as well as the corresponding obligations under 47 U.S.C. § 271. *See generally Omaha Forbearance Order* at ¶¶ 84-110.

[28] *Id.* at ¶ 85 (declining to forbear from applying Section 251(c) obligations to Qwest because, "while a substantial portion of customers within the 9 wire centers at issue receive service from a

facilities throughout most of the New York MSA, Verizon continues to serve the vast majority of customers in the wireline mass market and in the enterprise market. No competitor could offer service without the ability to connect calls to and from Verizon's customers on just and reasonable terms. Even if a cable competitor in Verizon's territory eventually were to capture a majority retail market share, that would not diminish its need for interconnection, collocation, and related rights.[29]

The Commission has long recognized that, absent a statutory directive, incumbent LECs would have numerous incentives to avoid interconnecting on reasonable terms.[30] And as the Commission is well aware, efforts to negotiate interconnection agreements have generated costly and protracted disputes even in the absence of forbearance,[31] threatening the continued growth of facilities-based competition.[32]

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Qwest competitor not relying on a Qwest loop, a Qwest switch, or Qwest dedicated transport, *all* of its competitors in the Omaha MSA rely extensively on access to Qwest's network in order to exchange telecommunications traffic").

[29] Just as interconnection and collocation are essential prerequisites to facilities-based competition, the Act's resale and wholesale access provisions remain necessary even where competition has emerged because facilities-based providers cannot possibly duplicate the ubiquity of incumbent LEC networks and thus cannot operate entirely on an on-net basis. *See id.* at ¶¶ 88-89, 96.

[30] *See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 at ¶ 107 (1999) (finding that "an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides"), *vacated in part on other grounds*, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

[31] *See, e.g.*, Comments of Cox Communications, Inc., filed in WC Docket No. 04-223, at 31-35 (Aug. 24, 2004) (describing interconnection disputes involving Qwest, BellSouth, SBC, and Verizon); *see also Time Warner Cable Request for Declaratory Ruling That Competitive Local*

While Verizon's petitions do not specifically address Verizon's interconnection-related requirements, the Commission should not be silent on this subject in its final order. Ambiguity regarding the continuing vitality of Verizon's interconnection obligations will lead to unnecessary interpretive disputes and consequent delays in competitive entry. The Commission can head off this problem by stating expressly that relief from the interconnection and wholesale access requirements in Sections 251(c) and 271 has been neither requested nor granted.[33]

In addition, if the Commission grants Verizon's forbearance request relating to the application of price cap regulation to switched access services,[34] the Commission should, at a minimum, condition its ruling on Verizon's adherence to the "benchmark" regime that applies to competitive LECs under Section 61.26 of the Commission's rules, as it did with respect to Qwest.[35] Under that provision, access charges at or below a prescribed benchmark are presumed

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*Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, WC Docket No. 06-55, DA 07-709, at ¶¶ 3, 5-6 (WCB rel. Mar. 1, 2007) (describing several rural LECs' refusals to interconnect with wholesale carriers that exchange traffic on behalf of Time Warner Cable).

[32] *See, e.g.*, *Core Communications, Inc. v. Verizon Maryland Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962 at ¶ 41 (2003) ("[A]n incumbent LEC's failure to interconnect expeditiously may frustrate accomplishment of Congress's goal of introducing facilities-based competition to the local telecommunications market. Where interconnection is delayed, a competitive LEC's resources may be wasted, and its reputation may suffer permanent damage because it does not provide the promised service in a timely manner.").

[33] *See, e.g.*, *Anchorage Forbearance Order* at ¶ 22 (noting that competitive LECs in the Anchorage MSA may continue to compete with ACS by relying on "market-opening provisions under the Act, such as section 251 interconnection rights").

[34] *See Verizon NY Petition* at 4 n.3 (requesting forbearance "from price cap regulation set forth in Part 61 of the Commission's rules ([47 C.F.R.] §§ 61.41-61.49)").

[35] *See generally Omaha Forbearance Order* at ¶¶ 33, 39-41.

just and reasonable; competitive LECs therefore may file tariffs for such rates on one-day's notice without cost support, but cannot file tariffs at all where the rates are above that level.[36]

While the Commission decided to forbear from applying price caps to Qwest's mass market switched access charges, it determined that Qwest should comply with these competitive LEC tariffing rules "[t]o ensure that our forbearance today does not result in rates that are unjust or unreasonable," and also "in light of the 'unique nature' of the access market."[37] The access market is no less "unique" in the New York MSA (or any other MSA at issue), and Verizon has not shown otherwise. Accordingly, the Commission should apply the same condition, at a minimum, to any equivalent forbearance relief it grants to Verizon.

## III. THE COMMISSION SHOULD REJECT VERIZON'S UNSUPPORTED BID FOR DEREGULATION OF ITS SPECIAL ACCESS AND OTHER ENTERPRISE SERVICES.

Just as Qwest could not justify forbearance from the application of dominant carrier rules to enterprise services in Omaha, Verizon's half-hearted plea for such relief falls far short of meeting the statutory requirements.[38] Deregulating Verizon's special access and other enterprise services prematurely would expose wholesale and retail customers to price hikes and

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[36] *Id.* at ¶ 40. In Qwest's case, the benchmark was the rate that Qwest as the ILEC had charged for switched access services as of July 1, 2005. *Id.* at ¶ 41; *see also* 47 C.F.R. § 61.26(b)(1).

[37] *Omaha Forbearance Order* at ¶ 41 (citation omitted). The Commission previously explained that the "unique nature" of the access market arises from the fact that interexchange carriers are subject to the monopoly power that local exchange carriers wield over access to their end users and thus lack competitive alternatives in the market in which they purchase access services. *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 at ¶ 39 (2001).

[38] As noted above, the scope of forbearance sought by Verizon is unclear. While it purports to seek substantially the same relief obtained by Qwest, *Verizon NY Petition* at 1, which would suggest that it concedes its ineligibility for enterprise-market relief, it also requests relief from dominant carrier regulation without any apparent limitation to mass market services. *Id.* at 4 n.3.

unreasonable service terms in clear violation of Section 10's directive to safeguard competition and consumers.

As an initial matter, the Commission appropriately recognized in the *Omaha Forbearance Order* that the existence of mass market competition, no matter how robust, does nothing to justify deregulation of enterprise services.[39] Rather, forbearance from regulation of special access and other business-class services must be justified by direct evidence of facilities-based competition *in the enterprise market itself.* And Verizon must demonstrate such enterprise competition throughout "the entire MSA."[40]

Verizon does not come close to making the requisite showing. With respect to the New York MSA, Verizon provides only a breezy overview of cable operators' service offerings and aggregated data reflecting competitive line counts (glossing over the fact that CLECs as a group overwhelmingly rely on Verizon's last-mile facilities to reach their customers).[41] Verizon does not even purport to demonstrate that the entire MSA is subject to effective retail competition, much less sustainable facilities-based competition that would prevent Verizon from imposing excessive rates or engaging in unreasonable practices. To the contrary, Verizon concedes that [**confidential** *** ] percent of its wire centers lack any competitive fiber provider and up to

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[39] *Omaha Forbearance Order* at ¶ 50 (citing *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025 at ¶¶ 24-29 (1998)).

[40] *Id.*

[41] *See Verizon NY Petition* at 17-26. While Verizon also surveys competitive offerings from wireless carriers and VoIP providers, *see id.* at 8-14, the Commission has questioned the "full substitutability of interconnected VoIP and wireless services" even for mass market voice services offered by incumbent LECs. *Omaha Forbearance Order* at ¶ 72; *see also Anchorage Forbearance Order* at ¶ 29 (excluding these services from its analysis because "we lack sufficient data to evaluate the extent of substitution of interconnected VoIP and wireless services in the Anchorage study area"). Verizon has made no showing that such services are remotely capable of substituting for high-bandwidth enterprise services at the DS1 level and above.

[**confidential** *** ] percent of wire centers lack any switch-based CLEC.[42] The number of wire centers lacking full facilities-based competition—where competitors need not rely on Verizon's loop facilities—must be far greater still.

Not surprisingly (given the dearth of record evidence submitted by Verizon), the factors that the Commission applies in analyzing whether market power exists forcefully rebut any claim of nondominance in the enterprise market.

*First*, the Commission examines market share.[43] Verizon's estimate of competitors' share of switched business lines is [**confidential** *** ] percent.[44] This figure almost certainly overstates competitors' true gains in the market for special access services, because it counts all business lines, including those serving small businesses that the Commission would assign to the mass market. Moreover, while Verizon claims that its retail switched business lines have declined by [**confidential** *** ] percent in the last five years,[45] it fails to mention its dramatic *increase* in special access circuits.[46] Likewise, Verizon overlooks the substantial number of secondary lines that have been dropped as subscribers switched from dial-up Internet access to DSL service or integrated T-1 services. In any event, Verizon's estimated [**confidential** *** ]

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[42] *Verizon NY Petition* at 24 & Lew/Verses/Garzillo Decl. at ¶¶ 10, 46.

[43] *See Omaha Forbearance Order* at ¶¶ 28-30; *see also Anchorage Forbearance Order* at ¶ 9 ("In each case, the Commission begins by examining the level of retail competition to the incumbent LEC . . . ."); *id.* at ¶ 28.

[44] *Verizon NY Petition* at 24. Verizon estimates its residential market share loss as approximately [**confidential** *** ] percent. *See id.*, Lew/Verses/Garzillo Decl. at ¶ 8. Although that figure is [**confidential** *** ] as Qwest's residential market share loss in Omaha, Time Warner Cable does not oppose forbearance from dominant carrier regulation of Verizon's mass market switched access services, based on the relative absence of barriers to facilities based competition in the mass market.

[45] *Verizon NY Petition* at 24-25.

[46] *Compare* ARMIS 43-08 Report, Table III (2000) (reporting approximately 8.5 million voice grade equivalent lines provided via special access), *with* ARMIS 43-08 Report, Table III (2005) (reporting 52 million lines).

percent share is consistent with the shares of carriers that have been classified as dominant by the Commission.[47] In addition, Verizon's data make clear that it is not subject to enterprise competition throughout "the entire MSA,"[48] as the Commission requires. Rather, as noted above, Verizon concedes that fully [**confidential** *** ] percent of wire centers in the New York MSA do not have *any* competitive fiber providers and up to [**confidential** *** ] percent of wire centers lack any switch-based CLEC.[49]

*Second*, the Commission examines market elasticities and structure. Demand elasticity "refers to the willingness and ability of a firm's customers to switch to another provider or otherwise change the amount of services they purchase from that firm in response to a change in price or quality of the service at issue."[50] Supply elasticity "refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price."[51] Both of these factors weigh heavily against forbearance from dominant carrier regulation of Verizon's enterprise services.

In analyzing demand elasticities for mass market services in the *Omaha Forbearance Order*, the Commission found that "residential customers are highly demand-elastic, and willing

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[47] *See, e.g., American Telephone & Telegraph; Application Under Section 214 of the Communications Act for Authority to Acquire Certain Lines of Western Union Corp.*, Memorandum Opinion and Order, 6 FCC Rcd 115 at ¶ 12 (CCB 1990) (noting that "AT&T still is dominant" in the domestic interstate interexchange market, where AT&T's share was 67.4 percent); *compare Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880 at ¶¶ 13, 51 (1991) (agreeing with DOJ's assessment that AT&T's declining market share for domestic interstate outbound services, which had fallen to 50 percent, was "by no means low" but was "below the level usually associated with market power").

[48] *Omaha Forbearance Order* at ¶ 50.

[49] *Verizon NY Petition* at 24 & Lew/Verses/Garzillo Decl. at ¶¶ 10, 46.

[50] *Omaha Forbearance Order* at ¶ 32.

[51] *Id.* at ¶ 35.

to switch to or from their provider to obtain price reductions and desired features."[52] Notably, the Commission made no such finding with respect to business customers. Similarly, the Commission's finding that supply elasticity is high for mass market services has no bearing on the appropriate enterprise market analysis.[53] As with demand elasticity, the Commission made no equivalent finding for enterprise market services in Omaha, and could not have for the same reasons. While Time Warner Cable has built out facilities enabling the provision of voice service to most households in the portions of the New York MSA in which it operates, Time Warner Cable is unable to reach most enterprise customers using its own last-mile facilities.[54] And barriers to entry can be extremely high. As the Commission has recognized in its local competition proceedings, the cost of constructing new loop facilities can be prohibitive, particularly where customer demand is below the level of multiple DS3s.[55] Moreover, building access problems—for example, an owner's refusal to permit competitive entry or imposition of unreasonable fees—often limit a cable operator's ability to reach a customer even where it has fiber passing the customer's location.[56]

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[52] *Id.* at ¶ 33.

[53] *See Omaha Forbearance Order* at ¶¶ 35-37 (finding that Cox could relatively easily increase its network capacity and that barriers to entry were low).

[54] *See, e.g., United States v. Verizon Communications, Inc. and MCI, Inc.*, C.A. No. 1:05CV2103, Complaint at 5, ¶ 15 (filed Oct. 27, 2005) ("DOJ Complaint") ("For the vast majority of commercial buildings in its territory, Verizon is the only carrier that owns a last-mile connection to that building.").

[55] *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 at ¶¶ 150-54 (2005) ("*Triennial Review Remand Order*") (describing entry barriers); DOJ Complaint at 9, ¶ 27 (building entry "is a difficult, time-consuming, and expensive process").

[56] *See Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, 14 FCC Rcd 12673 at ¶¶ 28-35 (1999); *Triennial Review Remand Order* at ¶¶ 151, 153.

The Commission's market structure analysis also takes into account the incumbent's advantages resulting from its "lower costs, sheer size, superior resources, financial strength, or technical capabilities."[57] In examining this factor in Omaha, the Commission found that Qwest did not possess insurmountable advantages that would preclude effective facilities-based competition for mass market services.[58] But that mass market analysis, just as in the case of elasticities, does not hold true for enterprise services (as reflected, once again, by the Commission's refusal to forbear from dominant carrier regulation of such services in Omaha). For example, the Commission relied on the fact that Cox had technical expertise in the provision of mass market services and that it had "well over one million lines in service."[59] But Cox had far less experience and far less market penetration in the more complex enterprise segment. The same analysis holds true in the New York MSA (and the other MSAs at issue here). Time Warner Cable, for its part, has now become a major provider of residential telephony services and is equipped to compete head to head with Verizon in that market segment; but Time Warner Cable cannot come close to matching Verizon's superior resources (including network facilities and personnel) and experience in serving enterprise customers, as reflected by Time Warner Cable's nascent presence in the enterprise market. Thus, the relevant strengths of Verizon and its competitors weigh against dominant carrier relief in the enterprise market, just as the analysis of elasticities does.

Finally, while the Commission predicted in the *Omaha Forbearance Order* that Cox "poses a substantial competitive threat to Qwest for higher-revenue enterprise services,"[60] it did

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[57] *Omaha Forbearance Order* at ¶ 38.

[58] *Id.*

[59] *Id.*

[60] *Id.* at ¶ 66.

so only in the context of determining the scope of *unbundling* relief to which Qwest was entitled. As noted above, notwithstanding its rosy outlook on Cox's future as an enterprise market competitor in certain wire centers, the Commission flatly rejected Qwest's bid for relief from dominant carrier regulation of its enterprise services. The key difference between the unbundling and dominant carrier analyses is that, where unbundling requirements have been lifted, competitors can continue to compete using special access channel terminations to reach their customers, as many CLECs already were doing in Omaha.[61] Granting forbearance from dominant carrier regulation, by contrast, would leave such competitors vulnerable to price increases and the imposition of unreasonable service terms and conditions, in which case the retail competition that gave the Commission comfort in forbearing from unbundling obligations likely would be undercut. In other words, while competitors' heavy reliance on special access facilities arguably provides a basis for forbearing from unbundling requirements, it signifies that the Commission could *not* forbear from dominant carrier regulation without jeopardizing competition and consumer welfare.

## IV. THE COMMISSION SHOULD DENY VERIZON UNBUNDLING RELIEF IN ANY WIRE CENTERS THAT LACK THE REQUISITE DEGREE OF COMPETITIVE BUILD-OUT.

Finally, Verizon's apparent request for unbundling relief throughout each MSA at issue overstates the extent of facilities-based competition it faces and ignores the limitations set forth in the *Omaha Forbearance Order*. In granting forbearance from DS1 and DS3 loops in nine wire centers in the Omaha MSA, the Commission should have applied its build-out threshold separately at each relevant capacity level (*i.e.*, DS0, DS1, DS3 loops, etc.), rather than examining the *combined* total of mass market and enterprise locations in a wire center. Moreover, the

[61] *See id.* at ¶ 68.

Commission underestimated the difficulties faced by a cable operator in the enterprise market, even where it passes a relatively high percentage of end user locations. In any event, the Commission at a minimum should enforce the limitations it adopted in the *Omaha Forbearance Order*—and applied again in the *Anchorage Forbearance Order*—which require denial of forbearance in any wire center where cable facilities cover less than a threshold percentage of end user locations.[62]

As Verizon notes, Time Warner Cable's limited footprint in the New York MSA includes wire centers that account for only about [**confidential** *** ] percent of Verizon's residential access lines.[63] Because Time Warner Cable lacks access to the confidential data describing the network coverage of other facilities-based competitors, it cannot assess the overall extent to which any competitive build-out threshold would satisfied. Verizon concedes, however, that Cablevision, Time Warner Cable, Comcast, and RCN collectively are providing mass market voice services only to a subset of Verizon's wire centers,[64] which indicates that the applicable coverage threshold is not satisfied in some wire centers.

Even for cable operators like Time Warner Cable that do not purchase unbundled network elements ("UNEs"), the unbundling rules have an important procompetitive function. Time Warner Cable generally relies on wholesale interconnection and transmission services from carriers such as Sprint, which in turn must obtain unbundled transport and large quantities of special access services to originate and terminate Time Warner Cable's traffic. Time Warner Cable also must purchase special access services to reach certain business customers in some

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[62] *Omaha Forbearance Order* at ¶ 69; *Anchorage Forbearance Order* at ¶ 32.

[63] *Verizon NY Petition*, Lew/Verses/Garzillo Decl. at ¶ 21.

[64] *See id.* at ¶ 28 (identifying the percentage of Verizon's residential access lines represented by wire centers in which Cablevision, Time Warner Cable, Comcast, and RCN are providing mass market voice services).

circumstances. The unbundling rules have been pivotal in the development of such competitive wholesale and retail services. Not only do UNEs enable CLECs to charge affordable rates for transport and termination services, but the presence of UNEs in the marketplace disciplines the incumbent LEC's special access pricing, as the Commission has recognized.[65]

## CONCLUSION

For the foregoing reasons, the Commission should limit any grant of forbearance to Verizon by ensuring that all interconnection-related obligations remain in full force, Verizon remains subject to dominant carrier regulation of its enterprise services, and any unbundling relief at a minimum is restricted to wire centers that meet the competitive build-out test established in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*.

Respectfully submitted,

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[65] *See Triennial Review Remand Order* at ¶ 65 ("[T]the availability of UNEs is itself a check on special access pricing, and th[e] elimination of UNE availability to customers using tariffed alternatives might preclude competition using those tariffed services going forward. Specifically, without recourse to TELRIC-priced UNEs, carriers using special access could lose substantial bargaining power when negotiating special access rates.").